

# EXHIBIT 16

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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In re: BAIR HUGGER FORCED AIR  
WARMING DEVICES PRODUCTS  
LIABILITY LITIGATION

MDL No. 2666 (JNE/DTS)

This Document Relates to:  
ALL ACTIONS

**Joint Agenda and Report for  
December 20, 2018 Status Conference**

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Pursuant to Pretrial Order #3, undersigned Counsel submit this Joint Agenda and Status Report for the December 20, 2018 Status Conference:

**1. Pretrial Orders and Case Schedule**

Two of the Bellwethers Second cases, *Goodpaster*, 17-3056, and *Arnold*, 17-0459, were dismissed by stipulation on December 3. On December 6, plaintiff Axline moved to dismiss her remaining claims (i.e. her Minnesota consumer protection claims) without prejudice. (*Axline v. 3M Co., et al.*, No. 17-cv-0511 Dkt. No. 73.) The motion is noticed for hearing at the December 20 status conference. Defendants filed an opposition and cross-motion for dismissal with prejudice on December 12. (*Axline*, Dkt. No. 78.)

The remaining Bellwethers Second cases are *Partlow*, 16-cv-2144, and *Trombley*, 16-cv-4159. Both are Plaintiffs' picks. Fact discovery is under way in both cases. Pretrial Order No. 27 sets the following case deadlines for these cases:

January 11, 2019: Case-specific fact discovery closes.

January 18, 2019: Initial expert reports to be exchanged.

February 8, 2019: Rebuttal expert reports to be exchanged.

February 15, 2019: Deadline for the parties to inform the Court which case should be tried on May 13 or submit position statements.

March 7, 2019: Deadline for depositions of experts.

Per the suggestion of Judge Schultz, the parties will meet-and-confer to address the process for amendment of complaints in non-bellwether cases in light of the Court's choice-of-law rulings in *Gareis* and *Axline*.

The parties met with Judge Schultz on November 15 to continue their discussion on "bucketizing" cases. It is the parties' understanding that there may be a further discussion following the status conference on December 20.

## **2. Plaintiff Fact Sheets ("PFSs")**

Defendants have moved to dismiss an additional set of cases based on alleged PFS deficiencies. (Dkt. No. 1615.) As in prior months, Defendants have also addressed lists of PFS disputes to the Court as provided by PTO No. 14. Plaintiffs do not concede that cases included on these lists are in fact deficient.

## **3. Update on number and status of cases transferred into the MDL**

On December 7, 2018, there were 5,014 active federal Bair Hugger cases pending in this MDL. As of that date, 560 Bair Hugger cases (482 federal and 78 state) had been dismissed, either by stipulation or by Court order. Not all filed cases have been served on Defendants.

#### **4. Overview of related state court proceedings**

Plaintiffs' appeal from the summary judgment order in the Ramsey County cases was argued before the Minnesota Court of Appeals on November 7.

There are currently two other state court cases pending outside of Ramsey County, Minnesota:

*Petitta v. Ray R. Trey Fulp III et al.*, pending in the District Court of Hidalgo County, Texas. Plaintiff is represented by the Garcia & Martinez Law Firm. *Petitta* was filed on November 14, 2016. Only written discovery has occurred. The hospital defendant settled. The remaining co-defendant, the Plaintiff's orthopedic surgeon treating physician, filed an interlocutory appeal after the Court denied his motion to dismiss. That appeal has now been denied. Discovery was automatically stayed pending disposition of the interlocutory appeal. There will be a telephonic status on December 19 to discuss a new case schedule.

*Acosta v. 3M and Arizant Healthcare, Inc.*, pending in the Fourth Judicial District Court, Missoula County, Montana, Case No. DV-16-769, Dept. No. 4, Plaintiffs are represented by the Rossbach Law Firm. The Acosta case was filed on September 9, 2016. 3M and Arizant still have not been served.

#### **5. Overview of Canadian action**

On June 22, 2016, Defendants were served with a Canadian putative class action, *Driessen v. 3M Canada Company, 3M Company, and Arizant Healthcare Inc.*, filed in Ontario Superior Court of Justice, Court File No. 16-69039. Plaintiff Driessen seeks to represent a putative class of "[a]ll persons residing in Canada who had the 3M Bair Hugger

Forced-Air Warming Device used on them during surgery.” (Driessen Cplt. ¶ 4.) Plaintiff Driessen is represented by Jeff Orenstein and Andrea Grass of the Consumer Law Group Professional Corporation in Ottawa, Ontario. Defendants have retained Canadian counsel, Tim Buckley and Kate Crawford of Borden Ladner Gervais. On August 8, 2016, Defendants filed their Notice of Intent to Defend. There has been no recent case activity.

**6. Additional pretrial orders (including, but not limited to, rules and procedures, preservation order, and protective order of confidentiality)**

None.

**7. Status of Discovery**

*Partlow.*

<b>Deposition</b>	<b>Date</b>
Plaintiff Pearlie Partlow	Completed 12/5/18
Dr. Richard Stehl (PCP)	Completed 12/14/18
Rule 30(b)(6) Deposition of Dale Medical Center	12/17/18
Troy Burg (CRNA)	12/17/18
OR Inspection at Dale Medical Center	12/17/18
Christopher Howell (former 3M sales employee)	1/8/18
Stefanie Grace (former 3M sales employee)	1/10/18

Defendants were unable to take the deposition of the orthopedic surgeon who performed the plaintiff’s surgery, Dr. Clark, because he is in Stage 4 cancer treatment in Mexico and does not intend to return to the United States. Dr. Stehl, the plaintiff’s former primary care physician, refused to answer several questions at his deposition and instead asserted his 5th Amendment right against self-incrimination.

Plaintiffs noticed the depositions of Mr. Howell and Ms. Grace. Mr. Howell was the sales representative for the sales territory that included Dale Medical at the time of Ms. Partlow's surgery, and Ms. Grace was his supervisor. Both are now employed by a 3M competitor, Cincinnati SubZero, and are represented by CSZ's counsel. CSZ's counsel objected to the subpoenas for their depositions. Plaintiffs have requested the deposition of another former 3M sales representative, Chris Hartley, and the parties are in the process of meeting-and-conferring on that request.

**Trombley.** Plaintiff Ada Trombley and her husband Fred were deposed on December 11, 2018. The attorney for four of Ms. Trombley's treaters has indicated that he will provide dates for their depositions in January before the January 11 cutoff. Defendants continue to work to secure the deposition of one additional treater. The OR inspection is scheduled to take place on January 3, 2019.

### **8. Other Pending Motions**

On November 8, Defendants filed a Rule 12(c) motion for judgment on the pleadings in *Partlow*, one of the four remaining Bellwethers Second cases. (*Partlow*, No. 16-2144, Dkt. No. 14.) The motion is fully briefed and noticed to be heard at the December 20 status conference.

On November 8, Defendants' filed their Fourth Motion to Dismiss for Noncompliance with Pretrial Order No. 23. The motion is fully brief and noticed to be heard at the December 20 status conference. (Dkt. No. 1584.)

On November 20, Plaintiffs filed a motion for leave to amend in *Trombley*, one of the remaining Bellwether Second cases. (*Trombley*, No. 16-cv-4159, Dkt. No. 15.) The motion was argued before Judge Schultz on December 13 and was taken under advisement.

On November 20, the Court granted Defendants' letter requesting permission for leave to file a motion for reconsideration of the Court's December 13, 2017 order denying Defendants' general causation *Daubert* and summary judgment motions. The parties have been unable to reach agreement on a briefing schedule and will submit their separate proposals to the Court via ECF letter by December 20.

On December 11, Plaintiffs filed an objection to Judge Schultz's order denying their motion to substitute in *Connell*. (*Connell*, No. 16-cv-2351, Dkt. No. 11.) Defendants will file a response.

Dated: December 14, 2018

Respectfully submitted:

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